Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Connect America Fund	WC Docket 10-90
A National Broadband Plan for Our Future	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	WC Docket No. 07-135
High-Cost Universal Service Support	WC Docket No. 05-337
Developing an Unified Intercarrier Compensation Regime	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Lifeline and Link-Up	WC Docket No. 03-109

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC ON THE UNIVERSAL SERVICE-INTERCARRIER COMPENSATION AUGUST 3, 2011 PUBLIC NOTICE

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SUMMARY

Level 3 commends the Commission for continuing the necessary but difficult task of intercarrier compensation and universal service reform, and each of the plan proponents for their willingness to advance their plans. The Joint ILEC Letter and ABC Plan clearly reflect willingness among the participants in those discussions to compromise among their varying interests. However, because the Joint ILEC Letter, ABC Plan and RLEC Plan were developed by entities that have ILECs as specific components of their business, those plans are not "consensus" plans – despite how they may be labeled. Indeed, some modifications to those plans are necessary to accommodate the transitional needs of non-ILECs that provide access services in competition with the ILECs but who will not receive access replacement support under those plans, as well as to clarify rules and to shut off various modes of arbitrage used by some LECs. With respect to intercarrier compensation reform, the Commission's goal, in addition to ultimately achieving a unified intercarrier compensation rate for all traffic termination, should be to have a set of transitional rules that will be clear, enforceable, and that curb predictable (and already extant) forms of abuse. While the Joint Letter framework, along with the ABC Plan and RLEC Plan as modified by that Joint ILEC Letter, would succeed in ultimately unifying call termination rates, the proposed plans do not achieve clear and enforceable transition rules that curb predictable abuse.

To improve the Joint ILEC Letter framework, and to make it more balanced, Level 3 suggests the following:

- Put the entire country on the same access transition schedule – the Joint ILEC Letter's ILEC schedule, with one additional year at the start to allow all carriers to prepare for the coming changes. This would simplify the entire access reform process, reduce the need for access replacement by extending the transition by one year, and would not accelerate the access transition for CLECs serving rate-of-return ILEC areas ahead of the ILEC's access rate changes. Adding one year at the start at rates no higher than 2010-2011 rates gives carriers more time to adjust business plans, to attempt to develop replacement revenue streams (for those carriers not receiving access replacement funding), and to implement and conform to the changes made to simplify and curb abuses of the current access charge system, especially the CLEC benchmark.

- Make explicit whether and when the limits on access and other intercarrier compensation rates affect fixed facility charges, such as multiplexing and entrance facilities, as well as variable charges that are assessed on a per-minute basis.

- In the absence of ways clearly to define VoIP traffic and to police and enforce that definition, treat VoIP traffic the same as all other traffic. The ABC Plan does not precisely define "VoIP" traffic. It seems likely that the proponents mean to include, at a minimum, both "interconnected VoIP" and non-"interconnected VoIP" traffic, but the limits are not clear. For example, will the difference between "VoIP" and non-"VoIP" turn on whether traffic is handed from an end user to a carrier in IP, as distinguished from being converted to IP by a carrier? What happens if the enterprise customer purchases and collocates its media gateway in a collocation facility and leases a TDM connection from its premise to its collocated gateway? The VoIP/non-

VoIP distinction is not stable, particularly in the enterprise market. Moreover, in a world in which traffic frequently is handed off through successive, intermediary providers, it will be exceedingly difficult to track the traffic that fits within "VoIP" from other traffic once it has been all mixed. Particularly during the first two years under the Joint ILEC Letter framework, in which intrastate access rates are reduced to interstate access levels, there will be a substantial incentive for parties that might be assessed access to inflate their claims as to the amount of traffic that is "VoIP," with no clear way to either validate or refute those claims. This will not lead to any less litigation and any fewer disputes than already exist today.

- To end the disputes about whether traffic is properly classified as "access" or "non-access" – which will continue under the Joint ILEC Letter framework through the entire transition for terminating traffic and longer for originating traffic – the Commission should simply declare that traffic is rated according to rate centers associated with the calling and called party numbers (disregarding charge numbers and the non-mandatory Jurisdictional Indicator Parameter ("JIP")). While this will not always reflect the actual locations of the calling and called parties, it is simpler to implement and enforce than today's system of traffic factors.

- In addition to addressing traffic pumping and phantom traffic, the Commission needs to close additional arbitrage opportunities in the current rules regarding how access charges are to be computed, including:

    - Clarifying the CLEC benchmark that applies when the CLEC serves the end user with a single switch and provides common transport to the ILEC tandem. Rather the three different interpretations of the current rules, there should be one: in this situation, a CLEC should be entitled to tariff and collect end office switching plus common transport (i.e. tandem termination and tandem transport) and not for the tandem switching that is not separately provided.

    - Establishing that the CLEC benchmark for tandem service is not calculated by Amortizing Direct Interconnection or End Office Port charges to create per minute rates that are not in the ILEC's tariffed rates. When the CLEC is not providing end office switching but is only providing transport and tandem switching, the CLEC benchmark should be set at the ILEC rates for tandem switching (when provided) plus tandem termination and tandem transport. The CLEC should not add charges for amortized fixed facilities – such as trunk ports that it purchases and then converts into a per minute element – not also charged by the ILEC. This will incent parties to enter into direct interconnection arrangements, while at the same time reducing devices that some CLECs use today to extract even higher per minute rates for tandem switching than the ILECs charge for providing the same functionality.

    - Limiting LEC (both CLEC and ILEC) transport charges to the distance from the LEC's end office to the nearest incumbent tandem. Absent this, LECs may take advantage of convoluted traffic routing to create additional, excessive mileage charges to buttress falling access revenues or, in the case of a CLEC, to evade the impact of the benchmark rules.

- Establishing a bright line test that defines a local exchange carrier to be eligible to receive end office switching access charges when it is the carrier identified in the NPAC database as providing the calling party or dialed number. This will ensure that the LEC provisioning the calling or called party's PSTN address and ultimately arranging for the calling or called party's connection to and interaction with the PSTN is the LEC that receives end office switched access charges, irrespective of how or by whom last-mile transmission occurs or whether an end user (*i.e.*, a non-carrier) contracts with the LEC to provide that service.

- Benchmarking CLEC query charges to ILEC rates.

In addition, the Commission should not exacerbate number shortages by forcing carriers handling non-interconnected VoIP traffic that terminates to the PSTN to be assigned telephone numbers. Such an action serves no identifiable purpose, since these calls can be made from a computer at any location with Internet access. Given the small volume of these calls, they are best addressed through factors.

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COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC ON THE UNIVERSAL SERVICE-INTERCARRIER COMPENSATION AUGUST 3, 2011 PUBLIC NOTICE

Level 3 Communications, LLC ("Level 3") submits these comments in response to the Federal Communication Commission's ("FCC" or "Commission") Public Notice ("PN") issued August 3, 2011.[1] That Notice sought comment on certain specific proposals for reform, including a plan submitted by the State Members of the Federal-State Universal Service Joint

[1] *Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, Public Notice, WC Docket Nos. 10-90, 07-135, 05-337, and 03-109, CC Docket Nos. 01-92, and 96-45, and GN Docket No. 09-51 (2011) ("*PN*").

Board, the "America's Broadband Connectivity Plan" ("ABC Plan") proposed by a group of six price cap regulated incumbent local exchange carriers ("ILECs"), and a proposal by a group of rural ILEC associations ("RLEC Plan"), both on their own and as modified by framework letter filed July 29, 2011 by the ABC Plan signatories, United States Telecom Association, National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") and the Western Telecommunications Alliance ("Joint ILEC Letter").

Level 3 commends the Commission for continuing the necessary but difficult task of intercarrier compensation and universal service reform, and each of the plan proponents for their willingness to advance their plans. The Joint ILEC Letter and ABC Plan clearly reflect willingness among the participants in those discussions to compromise among their varying interests. However, because the Joint ILEC Letter, ABC Plan and RLEC Plan were developed by entities that have ILECs as specific components of their business, those plans are not "consensus" plans – despite how they may be labeled. Indeed, some modifications to those plans are necessary to accommodate the transitional needs of non-ILECs that provide access services in competition with the ILECs but who will not receive access replacement support under those plans, as well as to clarify rules and to shut off various modes of arbitrage used by some LECs. With respect to intercarrier compensation reform, the Commission's goal, in addition to ultimately achieving a unified intercarrier compensation rate for all traffic termination, should be to have a set of transitional rules that will be clear, enforceable, and that curb predictable (and already extant) forms of abuse. While the Joint Letter framework, along with the ABC Plan and RLEC Plan as modified by that Joint ILEC Letter would succeed in ultimately unifying call termination rates, they do not achieve clear and enforceable transition rules that curb predictable abuse. Such clear and enforceable transition rules are a key to reducing unnecessary costs and promoting a cost-effective operation of the telecommunications infrastructure – so that it can support job-creation.

To improve the Joint ILEC Letter framework, and to make it more balanced, Level 3 suggests the following:

- Put the entire country on the same access transition schedule – the Joint ILEC Letter's ILEC schedule, with one additional year at the start to allow all carriers to prepare for the coming changes. This would simplify the entire access reform process, reduce the need for access replacement by extending the transition by one year, and would not accelerate the access transition for competitive local exchange carriers ("CLECs") serving rate-of-return ILEC areas ahead of the ILEC's access rate changes. Adding one year at the start at rates no higher than 2010-2011 rates gives carriers more time to adjust business plans, to attempt to develop replacement revenue streams (for those carriers not receiving access replacement funding), and to implement and conform to the changes made to simplify and curb abuses of the current access charge system, especially the CLEC benchmark.
- Make explicit whether and when the limits on access and other intercarrier compensation rates affect fixed facility charges, such as multiplexing and entrance facilities, as well as variable charges that are assessed on a per-minute basis.
- In the absence of ways clearly to define VoIP traffic and to police and enforce that definition, treat VoIP traffic the same as all other traffic. The ABC Plan does not precisely define "VoIP" traffic. It seems likely that the proponents mean to include, at a minimum, both "interconnected VoIP" and non-"interconnected VoIP" traffic,

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I. The Commission Should Adopt a Uniform Intercarrier Compensation Plan that Provides Adequate Time for All Access Recipients to Transition Their Businesses and Reduce the Anticompetitive Impact of the Joint ILEC Proposal.

The Joint ILEC Letter, as supplemented by the ABC Plan and Joint RLEC Plan – although certainly a step forward in the process of developing a workable intercarrier compensation reform plan – creates a disjointed intercarrier compensation reform process that is competitively skewed and that does not provide CLECs who also receive access charges with sufficient time to make changes to their business, even though CLECs are the only entities that can tariff access charges that will not receive any access replacement support from the USF (whether transitional, as in the case of the price cap LECs under the ABC Plan, or permanent, as the Joint RLEC Plan appears to contemplate). Under the Joint ILEC Letter framework, all CLECs would have their terminating end office rates – and in some cases, including transport rates – reduced to $0.0007 per minute over five years.[2] RLECs, however, make the same reductions over seven years.[3]

The Joint ILEC Letter, ABC Plan and Joint RLEC Plan all acknowledge that these changes in terminating rates, particularly for end office termination, will dramatically reduce intercarrier compensation revenues for all entities that tariff access charges today. Accordingly, the ABC Plan and Joint RLEC Plan both propose access replacement support – to be paid from the Universal Service Fund funded by all telecommunications carriers and interconnected VoIP providers – to cushion ILECs from the impact of these changes. For RLECs, there is no

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[2] Letter from Robert W. Quinn, Jr., AT&T Inc., Steve Davis, CenturyLink, Inc., Michael T. Skrivan, FairPoint Communications, Inc., Kathleen Q. Abernathy, Frontier Communications, Kathleen Grillo, Verizon, and Michael D. Rhoda, Windstream, to Marlene H. Dortch, Federal Communications Commission at Attachment I, p. 10 (July 29, 2011) ("*ABC Plan*"). In the final step, the $.0007 cap applies "to transport and termination within the tandem serving area where the terminating carrier does own the serving tandem switch." *Id.* at 11.

[3] Letter from Walter B. McCormick, Jr., United States Telecom Association, Robert W. Quinn, Jr., AT&T Inc., Melissa Newman, CenturyLink, Inc., Michael T. Skrivan, FairPoint Communications, Inc., Kathleen Q. Abernathy, Frontier Communications, Kathleen Grillo, Verizon, Michael D. Rhoda, Windstream, and Shirley Bloomfield, National Telecommunications Cooperative Association, to Julius Genachowski, Michael J. Copps, Robert M. McDowell, and Mignon Clyburn, Federal Communications Commission at 3 n.1 (July 29, 2011) ("*Joint ILEC Letter*").

provision that this access replacement support ever disappears;[4] for the price cap LECs, the access replacement support remains until 2020.[5] These mechanisms mean that, at the shortest, incumbent LECs will have eight years to transition their business plans to permanent lower levels of revenue from intercarrier compensation (as supplemented during the transition by access replacement support).

The impact of the reductions in terminating access compensation is no less significant for CLECs than for the ILECs. Business plans cannot be shifted overnight. CLECs cannot simply raise end user prices to offset reductions in terminating access compensation, because they cannot feasibly charge end users more than the ILECs do. As presently structured, the Joint ILEC Letter framework would execute an FCC-sanctioned, classic retail price-margin squeeze on CLECs,[6] anticompetitively reducing CLECs' intercarrier compensation revenues while protecting ILECs against the full extent of those reductions.

Even if these anticompetitive effects are not eliminated, they can at least be mitigated by extending the intercarrier compensation reform timetable for RLECs by one year, and then

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[4] *See* Joint ILEC Letter at 3 n.1; Comments of National Exchange Carrier Association, Inc.; National Telecommunications Cooperative Association; Organization for the Promotion and Advancement of Small Telecommunications Companies; and Western Telecommunications Alliance, WC Docket Nos. 10-90, 07-135, and 05-337, GN Docket No. 09-51, and CC Docket No. 01-92 at 13-14 (filed Apr. 18, 2011) ("*RLEC Plan*").

[5] ABC Plan at 13.

[6] Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 246-49 (1986) (Raising input costs "will raise entry barriers into the market," prevent consumers from benefiting from production efficiency, and create a "supply restraint, . . . [which] can generate monopoly power that would not exist otherwise"). *See also General Motors Corporation & Hughes Electronics Corporation, Transferors*, 19 FCC Rcd. 473, 511 ¶ 78 (2004) (Non-affected firms in a price squeeze "may be able to increase . . . profits by raising prices in the downstream market, or increasing . . . market share in that market, or both"). The FCC has enforced special conditions in merger proceedings to prevent exactly this type of price squeeze. *Id.* at 514 ¶¶ 87-88.

applying that schedule to all carriers, whether ILECs or CLECs. This would bring all LECs to terminating end office rates of $0.0007/minute at July 1, 2020, commensurate with the end of transitional access replacement for the price cap LECs. To reflect that fact that price cap LEC end office rates are generally below $0.005/minute, entities operating in the price cap LEC areas would have an interim terminating end office cap of $0.002, rather than $0.005, to be reached at the start of Step 5.

Finally, at several steps the description of rates that would be capped appears to be incomplete. It is not clear, for example, why the first step of the Joint ILEC Letter's proposed RLEC intercarrier compensation reform timetable limits its cap just to interstate access rates, as opposed to all intercarrier compensation rates.

Taking all of these proposed changes into account, the intercarrier compensation reform schedule would be as follows:

July 1, 2012	All intercarrier compensation rates, including terminating switched access rates, will be capped at the start of the first year at the higher of the current rates or, for end office termination, $.0007.[7]
July 1, 2013	Intrastate terminating access rates for transport and switching, if above the carrier's interstate access rate, reduced by 50% of the differential between the rate and the carrier's interstate access rate. Interstate terminating access rates for transport and switching, if above the carrier's intrastate access rate, reduced by 50% of the differential between the rate and the carrier's interstate access rate.

[7] As discussed further below, Level 3 believes that the distinction between VoIP and non-VoIP traffic cannot be policed and enforced. Accordingly, there is no step in this schedule for implementing the Joint ILEC Letter's proposed treatment of VoIP traffic. Should the Commission nonetheless adopt that distinction, it should make it effective July 1, 2012, rather than January 1, 2012. Given that rules are unlikely to be adopted before late fall 2011, which then will require Office of Management and Budget ("OMB") approval, January 1, 2012 will not give carriers sufficient time to prepare for implementation of the new rules regarding VoIP.

July 1, 2014	Terminating intrastate and interstate access rates are unified at the lower of the two.
July 1, 2015	Terminating end office rates reduced to \$0.002 (\$0.005 for carriers operating in Rate-of-Return Carrier areas)[8] over three equal steps.
July 1, 2016	Step 2 of terminating end office rates to \$0.002 (\$0.005 for carriers operating in Rate-of-Return Carrier areas)
July 1, 2017	Step 3 of terminating end office rates to \$0.002 (\$0.005 for carriers operating in Rate-of-Return Carrier areas) At this step, FCC proceeding determines if continued transition should be slower or faster, and for what carriers.
July 1, 2018	Unless otherwise determined by the FCC, terminating end office rates to \$0.0007 in three additional steps.
July 1, 2019	Step 2 of terminating end office to \$0.0007.
July 1, 2020	Step 3 of terminating end office to \$0.0007. End of Access Replacement support for price cap ILECs.

In addition to being more competitively equitable between CLECs and ILECs (although the presence of any access recovery support means that it will still be inequitable), this schedule has other advantages. First, because subscriber line charge ("SLC") cap increases can still begin July 1, 2012, to the extent they would be justified by the carriers' access revenue requirements, the need for access recovery support would be reduced. In other words, as reductions are made at subsequent steps, the SLC caps will already be higher, and thus able to offset a larger amount of access reductions than under the Joint ILEC Letter framework and ABC Plan. This means that upward pressure on the universal service fund will be reduced and the fund is more likely to stay "within budget."

Second, the Commission will be less likely to face a hodge-podge of rates. Under the Joint ILEC Letter framework, for example, the concept of a CLEC access charge benchmark tied

[8] To be "operating" in the RLEC area, a CLEC would have to be operating a switch and serving the RLEC area.

to the ILEC rates is abandoned completely in Rate-of-Return LEC areas. All CLECs are following the price cap ILEC transition, irrespective of their service area. This is both likely to create further competitive inequity and additional arbitrage. Unifying the intercarrier compensation reform schedule will reduce both those inequities and the additional arbitrage opportunities.

While these changes will not entirely eliminate the ILEC-bias of the Joint ILEC Letter framework, together with other clarifications and improvements suggested in these comments, they would create a more workable and equitable intercarrier compensation framework that fundamentally achieves the Commission's goals of a longer term, more stable, pro-broadband intercarrier compensation framework that reduces arbitrage and minimizes wasteful disputes.

II. The Commission Should Make Clear the Rates to Which the Access Transition Applies, and When.

Neither the ABC Plan nor the RLEC Plan makes clear which reductions apply to facility charges billed on a flat rate per month, such as multiplexing and entrance facilities, as opposed to charges that are assessed on a per minute basis. In the first steps when both transport and end office rates are being unified across both the interstate and intrastate jurisdictions, it makes the most sense for those changes to apply to both fixed facilities and per-minute facilities. If this is not done, carriers will still have to administer two sets of rates for fixed facilities. There is no apparent logic to unifying per-minute charges but not per-month charges.

Likewise, when these plans reference "end office rates" they should include all charges associated and necessary to use the end office facilities, and not just the single end office switching rate element or just those with per-minute rates. To the extent that facilities billed on a flat rate per month are also necessary to use the end office, these facilities should have a commensurate reduction. Otherwise the rate reductions could prove to be illusory as the total rate incurred to use the end office could be substantially above the targeted "end office" rates.

III. The ABC Plan's Proposed Treatment of VoIP Cannot Feasibly Be Implemented, Policed, and Enforced, Particularly for the Limited Transition Envisioned.

The Joint ILEC Letter and ABC Plan propose to have the Commission declare, on a going forward basis, that VoIP traffic, i.e., traffic that "originates and/or terminates in IP format," "will be subject to access charges at interstate rates if interexchange, or reciprocal compensation if local."[9] According to the proponents, the determination as to whether traffic is subject to access or reciprocal compensation "will be based on the origination and termination points of a call as determined by true, unaltered call detail information."[10] The Public Notice seeks comment on how VoIP traffic would be identified.[11] Unfortunately, it does not appear that there are any clear ways to identify VoIP traffic, and thus this aspect of the proposal is likely to create more arbitrage and disputes, rather than reducing them.

In the first instance, it is not entirely clear what traffic falls within the definition of "VoIP" proposed by the ILEC proponents. For example, the proposed definition of "originates and/or terminates in IP format" suggests that the traffic is either received from or delivered to the end user in IP format. This would appear to include, at a minimum, any traffic converted to IP format prior to crossing the demarcation between the end user's facilities and the carrier's, irrespective of whether the conversion occurs just before the traffic exits the end user's premises. But is this the limit of VoIP traffic? What happens if a provider offers an IP Centrex offering, in which traffic is converted to IP on the carrier's side of the demarcation point? Is that traffic then

[9] Joint ILEC Letter at 3; *see also* ABC Plan at 10.

[10] Joint ILEC Letter at 3; *see also* ABC Plan at 10.

[11] PN at 17.

non-VoIP and subject to intrastate access charges? Given that 47 CFR § 69.5 has drawn a line between "interexchange carriers" and "end users," are all non-telecommunications carriers "end users" such that they could "originate" or "terminate" traffic in IP, and thus render the traffic VoIP traffic for these purposes? Can an end user, effectively, extend its premises to the carrier by collocating a media gateway at or near the carrier, converting traffic to IP at that point, and then handing it off to the carrier in IP? Would this be VoIP traffic? Answering these questions is fundamental to establishing, policing, and enforcing a distinction between VoIP and non-VoIP traffic during the period that such distinction is significant.

Monitoring, policing, and enforcing the VoIP/non-VoIP distinction becomes even more complicated for intermediate carriers that do not handle the origination and/or termination of traffic at the end user's premises. There is no apparent way for intermediate carriers to know from call signaling detail which traffic that they handle originates or will terminate in IP, which becomes even more difficult to determine when multiple intermediate carriers are involved in handling a call. VoIP and non-VoIP traffic will be commingled, and such commingling should not be discouraged, as it is critical to efficient management and operation of telecommunications networks.

While the Commission could, as XO Communications LLC ("XO") suggests, ask industry to develop and implement a signaling field to designate a particular call as IP originated, such a field(s) will not be effective unless it is mandatory.[12] Moreover, when a call is terminated in IP, such a field would have to be populated and sent back by the terminating carrier to the carrier from which it had received traffic, and would have to be passed upstream to each of the

[12] Comments of XO Communications LLC at 33, WC Docket Nos. 10-90, 07-135, 05-337, and 03-109, GN Docket No. 09-51, and CC Docket Nos. 01-92 and 96-45 (filed Apr. 1, 2011) ("*XO Section XV Comments*").

intermediary carriers that handled the call, all the way to the originating carrier so that the originating carrier would know which originating access rate to apply. Otherwise, carriers on the originating end of the call will not know whether interstate or intrastate access rates should apply. Incentives would exist both for carriers to erroneously denote traffic as IP or to fail to transmit the marker, depending on whether the carrier would otherwise pay or receive intrastate access.

Moreover, it is not at all apparent that such a system could be established in a timely manner for the limited period that interstate and intrastate termination charges would be in place. Under the Joint ILEC Letter, terminating access rates for non-VoIP and VoIP would differ only between January 1, 2012 and July 1, 2013. Even under the schedule Level 3 proposes above, these rates would differ only until July 1, 2014. Establishing and implementing a complex signaling process for VoIP that would have significance for the bulk of traffic only through, at most, July 1, 2014, would require carriers to incur substantial implementation costs for only a limited period of benefit.

The Commission asks whether "factors" could be used here. Factors have been used between carriers with respect to current traffic exchanges, and they are difficult to administer and subject to extensive disputes. Adding a "VoIP" factor simply adds yet another dimension for parties to dispute. Unscrupulous carriers will inflate their "VoIP" factors, seeking to gain temporary advantage. The only way to halt this behavior would be costly audits and litigation.

The Commission also asks whether "safe harbors" could be used. It is not clear how a "safe harbor" could improve the situation. Any "safe harbor" will be arbitrary and will have to permit a carrier to use, and justify, use of non-safe-harbor percentages. The Commission should be wary of utilizing carriers' self-reported percentages of IP traffic to set a safe-harbor, because unless the Commission is convinced that both it and the self-reporting carrier are utilizing the same definition of IP traffic, it could adopt a highly erroneous "safe harbor."

In the absence of a ready way to define VoIP clearly, and to police and enforce the limits of that definition, the Commission would be better off subjecting all traffic, both IP and non-IP, on a going forward basis, to the same intercarrier compensation rules. Carriers already have to try to distinguish between access and non-access traffic and between interMTA wireless traffic and intraMTA wireless traffic. Adding yet another distinction – VoIP or non-VoIP – will simply multiply disputes.

IV. In Order to Apply and Enforce its Intercarrier Compensation Transition Plan, the Commission Must Also More Clearly Delineate the Operation of its CLEC Access Charge Rules.

The Joint ILEC Letter and ABC Plan propose the prompt adoption of rules to address phantom traffic, traffic pumping and other arbitrage schemes.[13] These are important steps, and Level 3 supports adoption of the phantom traffic and traffic pumping rules proposed in the NPRM. As Level 3 noted in its reply comments, the rules regarding traffic pumping, including the requirement for any carrier engaged in revenue sharing to tariff access rates at the level of the BOC/largest ILEC in the same state, should apply to both wholesale and retail providers and to both originating and terminating access rates.[14] However, to be successful in curbing pernicious uneconomic arbitrage schemes and to make clear when LECs are entitled to collect access charges and in what amounts, the Commission must also undertake a handful of additional reforms.

[13] Joint ILEC Letter at 3; ABC Plan at 10.

[14] Reply Comments of Level 3 Communications, LLC at 4-5, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, and CC Docket Nos. 01-92, 96-45 (filed Apr. 18, 2011) ("*Level 3 Section XV Reply Comments*").

A. The Commission Must Clarify the Benchmark that Applies When the CLEC Serves an End User with a Single Switch and Provides Common Transport to the ILEC Tandem.

The Commission's *Eighth Report and Order* established that CLECs may not charge more than the local ILEC for providing the same services, but leaves open the potential for abuse because it remains difficult to determine which ILEC rates are used to establish the CLEC price cap in different network scenarios.[15] As Level 3 explained in its April 1, 2011 comments, while the Commission made clear while CLECs may not charge more than ILEC rates for identical services, they "have flexibility in determining the access rate elements and rate structure for the elements and services they provide," and need not mimic the ILECs' rate structure.[16]

As Level 3 noted in its comments, there are at least three different interpretations of the CLEC access framework as to what a CLEC may charge when it provides service to its own end user, and provides some transport, but then hands traffic off to the ILEC for delivery to the IXC.[17] These can be summarized as follows:

[15] *See Access Charge Reform*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108, 9116 ¶ 17 (2004) ("*Eighth Report and Order*"); Comments of Level 3 Communications, LLC at 5-7, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, and CC Docket Nos. 01-92, 96-45 (filed Apr. 1, 2011) ("*Level 3 Section XV Comments*").

[16] Level 3 Section XV Comments at 6; *see also Eighth Report and Order* at 9116 n.58.

[17] *See* Level 3 Section XV Comments at 6-7.

	Eighth Report and Order	*Cox Reconsideration Order*[18]	*PAETEC Communications, Inc. v. MCI Communications Services, Inc.*[19]
CLEC serves the end user with a single switch, and provides common transport to the ILEC tandem, with the ILEC connecting to the IXC.	**Full benchmark or end office switching plus common transport?** *Compare* "[A] competitive LEC that provides access to its own end users is providing the functional equivalent of the services associated with the rate elements listed in section 61.26(a)(3) and therefore is entitled to the full benchmark rate." ¶ 15. *with* "The competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers. Competitive LECs also have, and always had, the ability to charge for common transport when they provide it, including when they subtend an incumbent LEC tandem switch." ¶ 21.	**End Office Switching Only.** "[W]here a single switch is capable of providing tandem and end office functions, the Commission found that competitive LECs can charge the end office switching rate when they originate or terminate calls to end users, and the tandem switching rate when they pass calls between two other carriers." ¶ 26; *see also* "When a CLEC originates or terminates calls to end-users, the appropriate rate should be the competing ILEC's end office switching rate." Small Entity Compliance Guide, Tariffing of Competitive Interstate Switched Exchange Access Service, 19 FCC Rcd. 20446 (2004).	**Full benchmark.** "[W]e find that where a CLEC routes calls to its end-users through a tandem switch, whether it owns that tandem switch or not, it may charge the full benchmark rate for that service." 712 F.Supp.2d at 415.

[18] *Access Charge Reform*, Order, 23 FCC Rcd. 2556, 2565 (2008) ("*Cox Reconsideration Order*").

[19] 712 F. Supp. 2d 405 (E.D. Pa. 2010). The confusion still existing on this issue is at the crux of a current appeal in the Third Circuit. Verizon has appealed this decision, arguing that the CLEC can only charge for the services it actually provides; it can only charge two switching rates if it owns both switches. Opening Brief of Verizon Business, *PaeTec Commc'ns, Inc. v. MCI Commc'ns, Inc.*, No. 11-2568 (3d Cir. Aug. 10, 2011).

The FCC should make clear what CLECs can and can't charge in this circumstance. It makes most sense for CLECs in this situation to be able to charge for the work they perform through their single switch – end office switching and common transport – and not for additional tandem switching when that switching is not separately provided. Accordingly, the CLEC benchmark in this setting should not be the sum of all elements in a hypothetical end office and tandem switched call, but should be the rates for end office switching elements and common transport (i.e. tandem termination and tandem transport).

B. The Commission Must Also Clarify the Benchmark for Tandem Service Is Not Calculated by Amortized Direct Interconnection or End Office Port Charges.

As Level 3 also described in its comments,[20] the Commission should also make clear that the CLEC access charge benchmark, as applied to tandem service, is computed only using the ILEC tandem termination and tandem transport rate elements, to which tandem switching would be added when appropriate.[21] This can apply in some situations in which a CLEC serves its own end users, but also in situations in which the CLEC is providing a transit service to indirectly interconnect other carriers.

Level 3 and other carriers have encountered situations in which some CLECs calculate the relevant ILEC rate by purporting to derive a "per minute" rate from a rate that is actually a fixed monthly cost.[22] Low traffic will give rise to an artificially high "per minute" rate. CLECs can exploit this artificially high rate by delivering high volumes of traffic—where the marginal

[20] Level 3 Section XV Comments at 8.

[21] *Id*.

[22] *See* Level 3 Section XV Comments at 5-9; *accord, e.g.*, Comments of Neutral Tandem Inc., WC Docket Nos. 10-90, 07-135, 05-337, and 03-109, GN Docket No. 09-51, and CC Docket Nos. 01-92 and 96-45 at 5 (filed Apr. 1, 2011).

cost is actually lower—at the rate derived by the lower volume of traffic.[23] Precluding a CLEC from relying on monthly rates for direct interconnections or to import end office rate elements to derive any "per minute" charges if it does not directly interconnect with an interexchange carrier will directly address this problem. Because tandem termination and tandem transport are all billed by the ILEC on a per minute (or per mile per minute) rate, those elements are not subject to similar manipulation.

This clarification will also incentivize direct interconnection between IXCs and competitive tandem providers. When a competitive tandem provider interconnects indirectly with an IXC, both the competitive tandem provider and the ILEC will bill the IXC for tandem switching. The IXC thus has an incentive to negotiate direct interconnection to avoid being assessed two sets of tandem charges. Under the clarified benchmark, the competitive tandem provider would also have an incentive to negotiate reasonable direct interconnection because it would clearly be precluded from attempting to turn its own dedicated connection to the ILEC into a high profit center by artificially manufacturing a high per minute rate for traffic sent to the ILEC for indirect interconnection. This will facilitate negotiated agreements to minimize intercarrier compensation charges.

C. The Commission Must Prevent "Mileage Pumping" – Which Could Become More Prevalent as Local Switching Charges Are Reduced.

As AT&T, Verizon and Level 3 both explained in their Section XV comments, the Commission should also prevent "mileage pumping."[24] Some LECs (including both CLECs and

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[23] Level 3 Section XV Comments at 8.

[24] Level 3 Section XV Comments at 9; Comments of AT&T Inc, WC Docket Nos. 10-90, 07-135, 05-337, and 03-109, GN Docket No. 09-51, and CC Docket Nos. 01-92 and 96-45 at 30-35 (filed Apr. 1, 2011) ("AT&T Comments") (describing "mileage pumping"); Comments of Verizon and Verizon Wireless at 41-42, WC Docket Nos. 10-90, 07-135, 05-337, and 03-109,

ILECs) have artificially inflated mileage to take advantage of the per minute per mile charges for tandem transport, claiming that the LEC's end office (or the switch of a subtending carrier) subtends a faraway tandem and charging for the greater distance.[25] In this way, those carriers artificially inflate tandem transport charges, frustrating the ability of the benchmark to cap access rates.[26] To end this abuse for ILECs, the Commission should simply limit the ILEC to charging for the mileage from the ILEC switch to the nearest ILEC tandem. For CLECs, the Commission should compute the CLEC benchmark using the mileage between the CLEC end office (or subtending carrier switch) and the closest ILEC tandem, using the appropriate V&H coordinates (*e.g.*, from the Local Exchange Routing Guide).[27] No compensation regime in which the miles of transport (and, thus, total access charges) are determined based merely on the assertions of the billing carrier should be permitted.

D. CLEC Database Dips Should Be Reformed.

The Commission should also limit the charge for database queries made by CLECs to the ILEC rate benchmark.[28] The Commission's hope that CLECs would "not look to this category of tariffed charges to make up for access revenues that the benchmark system denies them" has proven overly optimistic.[29] Because these charges cannot be lowered through competition, the Commission should, at a minimum, benchmark them to the relevant RBOC/ILEC rate.

GN Docket No. 09-51, and CC Docket Nos. 01-92 and 96-45 (filed Apr. 1, 2011) ("*Verizon Comments*").

[25] *See* Level 3 Section XV Reply Comments at 6-7 (Apr. 18, 2011); Comments of AT&T (Apr. 1, 2011) at 30-35 (describing "mileage pumping"); Comments of Verizon (Apr. 1, 2011) at 41-42.

[26] *See id*.

[27] Level 3 Section XV Reply Comments at 6.

[28] *See* Level 3 Section XV Comments at 6; AT&T Comments at 40-41.

[29] *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, ¶ 56 and n.128 (2001).

However, if the Commission truly wishes the cost of 8YY database queries to reflect cost, as discussed in Level 3's comments,[30] the Commission should limit these charges for all LECs to $0.001 per query, a much more reasonable estimate of the actual cost per query than the national average of approximately $0.005 per query.

E. The Commission Should Establish a Bright-line Test that Defines a LEC to be Eligible to Receive End Office Switched Access to Charges When It is Identified in the NPAC Database as Providing the Calling Party or Dialed Number.

There have been developing disputes and litigation about when a LEC may charge for end office functionality, and when it may not do so. The Commission recently issued a decision in one such dispute, *AT&T Corp. v. YMax Communication Corp.*[31] That decision, however, was based on the particular language YMax drafted and placed in its tariff and the specific configuration of YMax's network architecture,[32] and did not make broader policy judgments applicable outside of that tariff language. Nonetheless, because the access charge rules differentiate between situations in which LECs provide end office functionality and ones in which they provide only transit, it is important for there to be a clear rule as to when a LEC is providing end office functionality and therefore can collect end office switching access charges, either originating or terminating.

The question of what constitutes end office functionality is particularly difficult in a wholesale setting, in which the LEC is providing a non-carrier entity with telephone numbers (at least today, in the absence of direct access to North American Numbering Plan numbers by non-carriers) and access to the PSTN, which that non-carrier entity (an "end user" as defined in Rule

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[30] Level 3 Section XV Reply Comments at 6.

[31] *AT&T Corp. v. YMax Communications Corp.,* Memorandum Opinion and Order, FCC 11-59, 26 FCC Rcd. 5742 (2011).

[32] *Id.* at 2 n.7.

69.2(m)) then uses to provide service to its customers.[33] This can occur both in situations in which the LEC's wholesale customer provides transmission over that wholesale customer's own facilities (such as a cable voice service provider), and when the LEC's wholesale customer's last mile connection to the calling or called party is provided by yet a fourth entity (such as would occur with "over-the-top" interconnected VoIP service in which the voice service is transmitted via an ISP's broadband connection).

The Commission needs a clean rule for determining when a LEC can be deemed to be providing end office service, and, just as importantly, when it is not.[34] Level 3 believes that a fair and symmetrical rule is that a CLEC provides end office service when it is identified in the NPAC database as providing the calling party or dialed number.[35] Today, neither a non-carrier cable telephony provider nor a non-carrier interconnected VoIP provider can obtain access to telephone numbers and interconnect with other PSTN carriers to exchange traffic originated from or terminating to the PSTN. The ability to provide PSTN addresses and exchange such traffic

[33] 47 C.F.R. § 69.2 ("End user means any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an 'end user' when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an 'end user' if all resale transmissions offered by such reseller originate on the premises of such reseller.").

[34] CMRS providers are not LECs, and are precluded from filing both interstate and access tariffs because the FCC has mandatorily detariffed CMRS access rates, *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services,* Second Report and Order, 9 FCC Rcd. 1411, 1480 ¶ 179 (1994), and because 47 U.S.C. § 332(c)(3) precludes states from regulating "rates charged by any commercial mobile service." Nothing discussed herein alters those decisions and statutory provisions.

[35] The NPAC is a unique and objective resource to use to determine who can charge for end office switching, as a telephone number can be identified in the NPAC as associated with local service by only one carrier. This proposal does not at this time address how this definition would need to be modified in the event that the Commission grants non-carriers the ability directly to be assigned numbers by the North American Numbering Plan Administrator. That should be considered as part of any proposal for direct assignment to non-carriers.

with the PSTN and to ensure routing to the end user is fundamental to providing the PSTN connectivity characteristic of an end office. This would apply regardless of how or by whom last-mile transmission occurs, or whether the end user (as defined in 47 C.F.R. § 69.2(m)) contracts with the LEC to provision those calling party or dialed numbers for the end user's customers. This would not include transit arrangements, which are indirect interconnection arrangements between *telecommunications carriers* that are subject to indirect interconnection obligations under Section 251(a). Level 3 agrees that on any end of a call, there can only be one "end office" access charge collected, and that it would not be legitimate for an intermediary carrier to collect an end office access fee for traffic handed off to another carrier for delivery to the end user.

Under such a rule, it would not matter whether a LEC itself provided interconnected VoIP service or had an end user customer that provided interconnected VoIP service but interconnected with the PSTN through the LEC – in either case, the LEC would receive end office access for handling the call originating from or terminating to the calling or called party to whom provided PSTN connectivity. This would treat the wholesale LEC the same as any other LEC in receiving access compensation. Indeed, to deny the wholesale LEC the ability to charge access in this situation would mean that, for a long distance call to either a party subscribed to a non-carrier cable telephony provider or a party subscribed to a traditional TDM LEC, the call to the TDM customer would always be subject to terminating end office access charges, and the call to the cable telephony customer never would be. Such a result would not be fair or balanced. At the same time, the rule Level 3 proposes would preclude a LEC, for example, from receiving end office compensation for service provided to the calling or called party by another carrier, such as a wireless carrier, consistent with the *Eighth Report and Order*. In addition, it would preclude schemes in which a carrier inserts a charge party number to redirect charges or to claim that another LEC is further downstream.

V. The Commission Should Make Clear that the Classification of Traffic as Access or Local during the Transition Should Be Done on the Basis of the Location of the Rate Centers Associated with the Assigned Originating and Terminating NANP Telephone Numbers.

The Commission should clarify its rule that traffic will be classified based on the relationship between the calling party number and the dialed number. If the two numbers are associated with rate centers in the same local calling area, the traffic will be considered local and billed at reciprocal compensation rates; otherwise, the traffic will be billed at access rates. The Commission has already made clear that some VNXX traffic, specifically ISP-bound traffic, is subject to this rule.

There is today no ready way to distinguish "access" traffic from "non-access" traffic. While in some cases carriers use the Jurisdictional Indicator Parameter ("JIP") field, use of this field is not mandatory. Traffic is not sent and received with geographical coordinates. The only universally available data is the calling and called party number. These numbers are associated with particular rate centers, and thus can be used to establish a rating convention.

Rating according to telephone numbers will, of course, lead to some instances in which the call originates or terminates at a different location that the one indicated by the telephone number. However, the question here is whether that is really a worse result in aggregate than the current system, in which carriers report factors to one another, and then dispute as to whether those factors are correct. Using telephone numbers to distinguish access and non-access calls is a simpler solution that all participants can easily monitor and enforce.

Adopting this convention would end, on a going forward basis, the industry's constant disputes as to how to rate wireless traffic, and which proportions of traffic are subject to access or reciprocal compensation. Similarly, disputes over VNXX arrangements would also end.[36]

VI. The Commission Should Not Require One-way (i.e. Non-Interconnected) VoIP Traffic to Be Assigned Geographically Specific NANP Numbers.

The Commission's PN requests comment regarding the implementation of any new call signaling rules that apply to one-way interconnected VoIP providers, specifically how call signaling rules could be applied to one-way interconnected VoIP providers, how could these requirements be implemented? [37] A non-interconnected VoIP provider may transmit traffic to a telecommunications provider for delivery on the PSTN. Because there is no inbound traffic associated with the non-interconnected VoIP service, the calling party has no telephone number for the VoIP provider to pass on.

No carve-out for the one-way VoIP niche is necessary, however. The volume of affected traffic is small enough that special considerations are unnecessary. Industry practice already has adequate means to effectively handle "indeterminate" traffic. Furthermore, the burden from these calls will continue to lighten as the step downs on access charges moves forward, pushing to a single long distance rate.

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[36] As Level 3 described in its comments, this result is actually compelled with respect to VNXX traffic. Comments of Level 3 Communications LLC on Intercarrier Compensation and Universal Service Reform, WC Docket Nos. 10-90, 07-135, 05-337, and 03-109, and CC Docket Nos. 01-92 and 96-45, and GN Docket No. 09-51 at 15-18 (filed Apr. 18, 2011). The Commission and the courts have already decided that all ISP-bound traffic falls within § 251(b)(5). In the post-*Worldcom* world, there are only two kinds of telecommunications traffic—traffic that falls within § 251(b)(5) and traffic that is exempted from § 251(b)(5) by § 251(g) until the Commission takes steps to complete the transition as envisioned by § 251(g). *Worldcom* decided that ISP-bound traffic is *not* exempted by § 251(g). Accordingly, this issue is already resolved, and the Commission should expressly say so to prevent the ILECs from continuing to pursue their baseless arguments to the contrary. *Id.*

[37] PN at 18.

Furthermore, non-interconnected VoIP providers should not be required to obtain and use geographically specific 10-digit NANP or ITU E.164 number for the caller simply to satisfy a rule aimed at curbing abusive phantom traffic. Assigning numbers is not a solution for non-interconnected VoIP, which can be nomadic or even mobile. Requiring companies to assign numbers would raise a host of related regulatory issues: What number would you assign? How would you determine the location? Assigning NANP numbers to non-interconnected VoIP would also greatly exacerbate number exhaust.

VII. Conclusion

The ABC Plan and Joint RLEC Plan are a step forward in developing a comprehensive solution for universal service and intercarrier compensation reform. However, before they are adopted, they need to be adapted to reflect the interests and transitional needs of more than just ILEC-affiliated carriers. Moreover, there are a range of additional clarifications that the Commission needs to make, particularly with respect to the operation of the CLEC access charge benchmark, transport charges by all LECs and to delineate when a wholesale LEC is entitled to collect end office charges, to further reduce arbitrage and ensure that there are clear rules that parties can police and enforce both during and after the intercarrier compensation transition. By setting clear rules, the Commission can reduce needless costs and complexity, which will promote the deployment of a robust – and job-creating – telecommunications infrastructure.

Respectfully submitted,

/s/

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